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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 343

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES, ETC.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, AS TRUSTEES, ETC.

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JURISDICTION

Appellees agree that this Court has jurisdiction of the appeal in this case.

QUESTIONS PRESENTED

Appellees agree that the questions presented are as stated by appellants.

Question II is not well worded. A more accurate statement is

> "Whether * * * the District Court had power to annul and enjoin that part of the Commission's order containing the conditions prescribed and leave outstanding that part of the order, authorizing the lease, without the conditions."

STATEMENT

Appellants' statement of the case is accepted.

SUMMARY OF ARGUMENT

I

The Interstate Commerce Act is a code of laws regulating the activities of railroads as *common carriers.* That term denotes a business "affected with a public interest." The word *public* refers to the persons who use the carriers' services; their *interest* is in the quantity, quality and cost to them of those services.

Such are the meaning and scope of the term "public interest" in Sec. 5 (4). The prescriptions of the entire Act are directed to the rights of common carriers and performance of their duties to the travelling and shipping public. Sec. 5 (4) authorizes approval of a lease of carrier property if the Commission finds that it will promote the public interest. This authority has direct relation to the standards prescribed for the service of common carriers, and, as shown by the context and purpose of the Act, is to be exercised in order to insure adequacy of transportation service, economy and efficiency, and best use of transportation facilities.

The carrier's employes, as such, are not a part of the public referred to in Sec. 5 (4), nor is their interest in securing or holding employment with the carrier a public interest. It is a private interest only, and therefore is not within the "public interest" to which Sec. 5 (4) refers. Congress has undoubted power to legislate on the subject of carrier employer-employe relationship; an example is the Railway Labor Act. But Sec. 5 (4) does not represent an exercise of that power; there Congress is dealing with an entirely different subject-matter, as shown by the terms used in, and the context and purpose of, the Act.

The conditions imposed by the Commission in this case are solely in the interest of the employes who will lose their positions as a result of unified operation under the lease. The continuance of their employment, or protection against hardship in losing their employment, is not a matter of interest to the travelling and shipping public, because these matters do not affect transportation conditions or the performance of common carrier activities. Hence, the imposition of the conditions was without the Commission's authority.

Appellants refer to the Commission's power to prescribe "terms and conditions as it finds to be just and reasonable," as a source of authority for the conditions. That power does not have the status of a standard for the guidance of the Commission; it lacks the qualifications of a standard incident to delegation of legislative power because it is indefinite and points to no end to be attained. Its function is merely to enable the Commission to alter a proposed lease, otherwise defective in complying with the standards of the Act, in such manner that it will conform.

That Sec. 5 (4) of the Act does not include the subject-matter of the conditions is further manifested by the fact that Congress has provided for payments to carrier employes who, without fault, become unemployed, by means of separate statutes dealing with the specific subject. To hold that Sec. 5 (4) authorizes the payment sought to be compelled by these conditions, is to place the carrier employer under the burden of a double payment—a burden not imposed upon any other employer. There is no reason which indicates that Congress had any such intention.

II

The order, exclusive of the conditions, is complete and self-sustaining. The Commission has found favorably upon every element which is properly embraced by the term "public interest." Those elements are by their very nature independent of and unrelated to the money payments required by the conditions, and the performance or non-performance of those conditions will not alter or qualify the force of the facts of record on which those particular findings are based. Removal of the conditions, therefore, leaves the promotion of the public interest unimpaired. To annul the conditions and leave the remaining part of the order in effect, does not have the effect of substituting the judgment of the court for the administrative judgment of the Commission. The Commission's judgment has already been exercised upon every factor within the domain of public interest. It cannot be heard to say that it might have arrived at a different judgment, or that a different administrative question would have been presented, if it had been advised that the conditions were beyond its powers. Those conditions embrace a different and independent subject; the omission of that subject from the deliberations of the Commission could not have altered the conclusions compelled by the facts of record relating to transportation conditions and cognate matters.

III

The payment of money to persons who are no longer employes and who render no service or give anything of value in return, is not a regulation of interstate commerce within the constitutional grant to Congress. The obligation of the conditions begins only when the payee's engagement in interstate commerce ends. At that time, the

ex-employe's disassociation from interstate commerce is as complete as before his employment began.

The claim that payments to ex-employes promote the welfare and morale of employes still in service by insuring that the latter may look forward to receipt of similar payments in the event their employment should cease because of lease, consolidation etc., is purely fanciful. The connection is too remote and speculative.

The conditions have the effect of depriving appellees of due process of law by taking their property and bestowing it as a gratuity upon others. Even if it could be conceived that such payments sufficiently touch and pertain to interstate commerce that their compulsion is a proper regulation thereof, the lack of due process of law remains. This Court has consistently maintained that the power to regulate commerce must be exercised in conformity with the requirements of the Fifth Amendment.

These constitutional objections do not arise if Sec. 5 (4) be construed not to extend to the subject-matter of the conditions.

Reply to Appellants' Argument

It is a mistaken assumption that the language of Sec. 5 (4), which gives the Commission power to impose such conditions as it shall find to be just and reasonable, constitute a standard to guide determination. They lack the necessary attributes of a standard that must accompany a delegation of legislative power. A standard measures what must be attained. "Terms and conditions" import no standard; they measure nothing, either alone or qualified by "just and reasonable.". They imply nothing regarding the subject-matter to be covered thereby; they point to no result that must be accomplished.

The power to impose conditions is merely a means whereby the Commission may cause that end to be attained in instances where the carrier's proposals fail to do so.

In their endeavor to make the statute comprehend employe interests in a lease arrangement, counsel expand the statute so as to take in "all parties involved and directly affected." This expansion not only is unjustified; it is insufficient for the purpose intended because the employe interest is not of such nature as to bring them within the designation stated.

Appellants' efforts to demonstrate that the conditions are "just and reasonable" is labor wasted. The petition does not raise that issue.

The subject of statutory protection to employes who lose their positions through consolidations, mergers, leases, etc., has engaged the attention of the Commission, of various public officials and of Congress itself, all to the end of procuring appropriate legislation. The number and extent of these efforts indicate widespread belief that no statutory provision in that behalf now exists. Counsel's explanation that the sought-for legislation is merely to "remove doubt" is not impressive.

Replying to the argument that the conditions *are* in the public interest: The Commission's finding that they are so does not support the proposition when that finding is the very matter under attack. Nor are statutes such as Hours of Service, Safety Appliance Act, the Railway Labor Act, etc., evidence in that behalf. These statutes concern actual railroad operation and affect employes while in the service, not after they leave it.

The just and reasonable character of the conditions does not permit them to escape operation of the Fifth Amendment. Appellants do not explain how this could result.

There is nothing in the statutes or the decisions of the Court which suggest that a remand to the Commission is necessary or proper. A remand in this case would serve no useful purpose. The Commission has made all of the basic findings necessary to support the valid part of the order; the subject-matter of the conditions is so unrelated to the valid part that the latter, and the facts of record which support it, cannot be affected by the elimination of the void portion. Upon remand, the legally relevant facts of record would compel the same conclusion as respects promotion of public interest, as the Commission has already made. The Commission's judgment, whether in the first instance or upon remand, must rest upon only those facts which it is empowered to consider; and it may not withhold its approval where the facts warrant because it would like to, but may not, consider a wholly different set of facts—in this case, the employes' interests.

Where conditions are severable, in accordance with established principles which determine severability, the "intent" of the Commission that they be inseparable cannot prevail.

ARGUMENT

APPELLEES' AFFIRMATIVE CASE IN SUPPORT OF THE DECREE BELOW

I

THE CONDITIONS IMPOSED BY THE COMMISSION ARE VOID BECAUSE THEY ARE UNRELATED TO THE STANDARDS ESTABLISHED BY THE STATUTE, AND HENCE ARE BEYOND THE COMMISSION'S POWER.

1. *Section 5(4)(b) Prescribes Two Standards to Guide the Commission's Determination; i. e., That the Proposed Lease (1) Will Be in Harmony With and in Furtherance of the Commission's General Consolidation of Railroads Plan, and (2) Will Promote the Public Interest.*

The Commission specifically found that the proposed lease complies with standard No. 1. "In *Consolidation of Railroads,* 159 I. C. C. 522, we assigned the properties of both carriers to System No. 19, Rock Island-Frisco." (R. 20.)

With respect to standard No. 2, this Court has held that the words "will promote the public interest" constitute an adequate standard to guide the Commission's determinations. *New York Central Securities Co.* v. *U. S.*, 287 U. S. 12, 24.

The Commission purported to find its authority to impose the conditions in question in the statutory term "public interest" which, it says, is broad enough to comprehend the interest of railway employees in changes in management, ownership or operations of the company by which they are employed. Appellees contend that this construction is untenable, being contrary alike to reason and to authority.

The words "public interest," standing alone, comprehend so wide a range of possible subjects as to be without value. Here, we are concerned with their meaning, determined from the text of the statute in which they stand, the "Interstate Commerce Act". That entire Act relates to a single subject—the rights and duties of common carriers of passengers and property. This Court has described that Act as

> "a code of laws regulating the activities of the common carriers subject to the Act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination." *Schechter Corp.* v. *U. S.*, 295 U. S. 495, 539.

"Common carrier", by ancient usage and understanding, is a term descriptive of the public character of the service, *i. e.*, the duty to serve any and every one on demand. Another conventional expression is that a common carrier is one whose business is "affected with public interest." Still another established expression is that a common carrier is one who holds himself out to the public to carry freight or passengers for hire. The *public* that is thus referred to means those persons who make use of the services and facilities of the common carrier. Hence, the public which is referred to in "a code of laws regulating the activities of common carriers" has reference to the people in whose interest such activities are regulated, those who ship goods or who travel as passengers in interstate commerce. Citizens who travel on the highway may have an interest in the police-power regulation which requires the railroad engineer to sound the whistle at highway crossings; citizens who sell materials and supplies to the railroad have an interest in the company as a customer; citizens who own its securities are interested in its prosperity. But these citizens, even if sufficiently numerous to

warrant designation as "public" are not those whose interests as highway travelers, merchants or stockholders are subserved by the Interstate Commerce Act. That Act deals with only *one interest* of the public, *i. e.*, transportation; and the Act is designed, in all the different aspects of its subject-matter, to secure the public's transportation needs, adequate in quantity and quality and at rates which are neither excessive nor discriminatory. The "public interest" which Section 5(4) requires to be promoted, is precisely the same as that dealt with by the entire scheme of regulation contained in the Act.

Such is the interpretation adopted by this Court. In *New York Central Securities Co.* v. *U. S.*, 287 U. S. 12, a minority stockholder sought to set aside the Commission's order approving the lease by the New York Central R. Co. of certain other railroad systems. With respect to the statutory criterion of "public interest", the Court said, (p. 24):

> "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court, in *New England Divisions Case*, 261 U. S. 184, 189, 190, adverted to that purpose, which was found to be expressed in unequivocal language; 'to attain it, new rights, new obligations, new machinery, were created.' The Court directed attention to various provisions having this effect, and to the criteria which the statute had established in referring to 'the transportation needs

of the public,' 'the necessity of enlarging transportation facilities,' and the measures which would 'best promote the service in the interest of the public and the commerce of the people.' Id. p. 189, *note*. See, also, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 277. The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, *but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities*, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred."

In *Texas, et al.* v. *United States*, 292 U. S. 522, another case involving a railroad lease approved by the Commission's order, the Court said:

"These broadening provisions of the Emergency Railroad Transportation Act, 1933, confirm and carry forward the purpose which led to the enactment of Transportation Act, 1920. (Title IV, 41 Stat. 474, *et seq.*) We found that Transportation Act, 1920, introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obligations, new machinery, were created. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585; *New England Divisions Case*, 261 U. S. 184, 189, 190; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478. It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. *Davis* v.

Farmers Co-Operative Co., 262 U. S. 312, 317; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277. The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.' *New York Central Securities Corp* v. *United States, supra.*"

In *Schechter Corp.* v. *U. S.*, 295 U. S. 495, the Court had occasion to refer to the powers of the Interstate Commerce Commission:

"When the Commission is authorized to issue, for the construction, extension or abandonment of lines, a certificate of 'public convenience and necessity,' or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest,' we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for *the service of common carriers* and can be exercised only upon findings, based upon evidence, with respect to particular *conditions of transportation.*" (p. 540).

The words "public interest" are also found in the Radio Act of 1927, which creates a Federal Radio Commission and confers upon it various powers, one of which is the granting of licenses to private radio stations. In *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, which involved the validity of an order of the Commission that granted a license to one station and terminated existing licenses held by appellee's stations, the Court said (p. 285):

> "In granting licenses the Commission is required to act 'as public convenience, *interest* or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. The requirement is to be *interpreted by its context*, by the *nature of radio transmission and reception, by the scope, character and quality of services*, and, where an equitable adjustment between States is in view, by the relative *advantages in service* which will be *enjoyed by the public* through the distribution of facilities."

In other words, the public whose interest the Radio Act is intended to conserve is the *public which makes use of the services* of radio transmission and reception.

The decisions of State courts accord with the foregoing. One of these, involving substantially identical principles, is *West* v. *P. B. & W. R. Co.* (Md.), 141 Atl. 509. The railroad, desiring to eliminate curves and improve grades, applied to the Public Service Commission of Maryland for approval. Objection was made to that feature of the plan which required an embankment 20 feet high at Port Deposit, whose presence would injure adjacent property by obstructing view, lessening light and air, etc. The Commission attached to its order a proviso fixing the minimum grade for the new line which would require a

less high embankment. On appeal, the Railroad Company contested the Commission's power to make the proviso; the conflict in views resulted from the different interpretations which the parties gave to the word "public," as used in the statute defining the powers of the Commission.

> "As the appellants construe it, it authorizes the commission, in dealing with an application such as that made in this case, to consider the effect of the proposed plan upon private property adjacent to the relocated railroad, and to weigh and balance any damage which it may cause to that property against any advantage which it will give the railroad company, and to grant it or refuse it as the one or the other preponderates. The appellees, however, contend that the only interest which the commission can consider is the interest which the whole public has in the maintenance of an efficient transportation system furnishing to the public adequate facilities, at reasonable rates. Both of these views have been forcibly and ably presented in this court, but in our opinion the question is free from any real difficulty."

After quoting from the statutes, the court continued (p. 515):

> "These quotations fairly reflect the purpose and scope of the entire statute, and it is manifest from an examination of it, as well as of them, that the *public interest* which is committed to the protection of the commission is the interest which the public has in the operation of the railroads in such a manner as to furnish efficient service at reasonable rates, and that the power of the commission over railroad companies lies within those limits. That is to say it has no power to interfere with any act or policy of the corporation which will not in some manner adversely affect the public interest in its service or rates. There

is nothing in the acts to support the theory that its purpose was to substitute the commission for the directors and officers of the corporation in the management and operation of the railroad, but every presumption is to the contrary."

And again (p. 516):

"But the 'public' referred to in that section obviously means the whole public, and not a particular part of it owning property contiguous to the railroad, and it is not apparent how the interest of the whole public would be served by requiring a railroad to be constructed at a grade which would make transportation over it more expensive and less efficient."

In *Cawker* v. *Meyer*, (Wis.) 133 N. W. 157, the action was brought to restrain the Railroad Commission of Wisconsin from enforcing certain provisions of the public utility law against plaintiffs. The Commission contended that plaintiffs were operating a public utility by furnishing heat, light and power to tenants of their own building. Plaintiffs contended that this was not a public use of their plant. The Court said (p. 159):

"It is very difficult, if not impossible, to frame a definition for the word 'public' that is simpler or clearer than the word itself. The Century Dictionary defines it as: 'Of or belonging *to the people at large*; relating to or affecting the whole people of a state, nation or community; *not limited or restricted to any particular class* of the community.' The New International defines it as: 'Of or pertaining to the people; relating to or affecting a nation, state or community at large.' The tenants of a landlord are not the public; neither are a few of his neighbors, or a few isolated individuals with whom he may choose to deal, though they are a part of the public. The word 'pub-

lic' must be construed to mean more than a limited class defined by the relation of landlord and tenant, or by nearness of location, as neighbors, or more than a few who, by reason of any peculiar relation to the owner of the plant, can be served by him."

2. *A Carrier's Employees, as Such, Are Not a Part of the Public, and Their Interest in Preserving Their Jobs Is Not Such Interest as the Statute Had in Mind. Their Interest Is a Private as Distinguished from a Public Interest.*

The foregoing cases make it apparent that the word "public" as used in statutes regulating the rights and duties of public service corporations, has reference to those persons who actually or potentially *deal with such corporations in respect of their public calling.* It may be, as remarked by Mr. Justice Holmes,

> "No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts."
>
> *Terminal Taxicab Co.* v. *Kutz, et al.*, 241 U. S. 252.

But it is those customers which constitute the public to which the regulatory statute refers.

The business of serving taxicab patrons at railway stations, hotels, etc., was held to be of public character. But that part consisting of livery service (furnishing automobiles from its central garage on orders) was held to be private business. As to this latter, Mr. Justice Holmes said:

> "It is true that all business, and, for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed."

If "public interest" were so used in Section 5(4), it would be too general and ambiguous to serve as a prescribed standard for the delegation of legislative power under the principle in *Union Bridge Co.* v. *United States*, 204 U. S. 364, 384-385.

Public interest, then, is the correlative of public duty; the ambit of one marks that of the other. But while every member of the public has the right to call upon the utility for its services, no one has the right to require the utility to enter into a private arrangement with him. A contract of employment is certainly a private arrangement; if a person is employed, it is as a private individual and not as a member of the public. The contract of employment is one which neither party is bound to make. To say, as the Commission does in its report, that employes have an interest in the management, ownership or operation of the companies by which they are employed, is true; it is equally true that a creditor of the company has an interest in such management, ownership or operation of his debtor company. But it is obviously untrue that the employe's interest is a public interest. As employes, they are not the public. It is a complete misuse of the term, in every conception which it involves, to call them so.

3. *The Commission's Power to Prescribe "Such Terms and Condition, and Such Modifications as it Shall Find to be Just and Reasonable" Is Neither an Independent Standard nor a Power to Alter or Add to the Two Standards Specifically Prescribed by Section 5(4). Its Purpose Is Merely to Enable the Commission to Apply a Corrective to a Proposed Lease and Thereby Make It Conform to the Standards of the Act.*

Section 5(4), sub-division (b), provides:

"If after such hearing, the Commission finds that, *subject to such terms and conditions and such modifi-*

cations as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable."

The expression "terms and conditions" cannot be an independent category of standard. These are general words and in themselves indicate no particular subject-matter, nor does the qualification "just and reasonable" make them otherwise in this respect. Being indefinite, they are too uncertain to serve as a prescribed standard in connection with delegation of legislative power; they point to no result which the Commission must bring about. This would seem too clear for mention except that appellants (Brief, p. 14, 16, *et seq.*,) treat the Commission's power to fix terms and conditions as one which is independent of, and additional to the statutory requirements of harmony with the general consolidation of railways plan and the promotion of public interest. The only limitation* which appellants acknowledge is that the conditions must be "germane to the transaction." Appellants regard the "transaction" as embracing "all parties affected thereby" (Brief, p. 14), or, "parties or groups whose interests are directly affected by an acquisition of control" (Brief, p. 23). That is to say, the transaction may be "germane" to employes, to merchants from whom the lessor has been accustomed to buy its materials and supplies, to merchants at points from which the lessee may transfer

* For brevity in discussion, we omit mention of the qualification "just and reasonable", which is, of course, understood to exist.

employes, to taxing districts from which the lessee may move shops or terminals, to minority stockholders, etc., all of whom are in a position to be "directly affected." Passing by the controverted question regarding employes, where is there any standard to guide the Commission's determination with respect to the others mentioned? *What* terms and *what* conditions may the Commission impose with respect to their interest in the transaction? The words themselves afford no clue, and there is no enlightening text. Interpreted as a distinct standard, a power to impose "terms and conditions" would be the Achilles heel of the statute.

The power to fix terms and conditions and to make modifications is given to the Commission in order that instead of denying an application for failure to conform to the prescribed standards, it may alter the proposed lease so as to make it conform. But whether the provisions and incidents of a lease originate with the applicants, or represent modifications and changes made by the Commission, the lease finally authorized must conform to the prescribed standards of the statute. In other words, the Commission can do only what was open to the applicant carriers to do in the first instance.

4. *By Separate and Distinct Legislation, Congress Has Provided for Payments to Carrier Employes Who, Without Fault, Lose Their Positions From Any Cause.*

To construe Sec. 5(4) as authorizing the Commission to impose the conditions in question is to hold that (1) Congress has dealt with the same subject twice by means of separate statutes, each creating its own separate and independent burden on the employer—and has done this only as respects *railroad* employers; and (2) the railroad employer is under a duplicate burden in respect of the ex-employes in this case.

Until July 1, 1939, railroad employers were subject to the Unemployment Tax provisions (Title IX) of the Social Security Act of August 14, 1935. On that date, their liability was transferred to the Railroad Unemployment Insurance Act. By these statutes Congress has specifically provided ways and means of mitigating the hardships of unemployment through loss of position; the railroad employer pays the tax to provide the necessary funds. Appellees have paid, and will continue to pay, such taxes. If the conditions in question are valid, appellees will have to pay additional sums for the identical purpose for which they have already paid in the form of taxes.

To conclude that Congress intended that the employe who loses his position from ordinary causes shall have but one benefit, but that the employe who loses his position as a result of unified operations under a lease shall have two benefits, makes Congress guilty of an absurdity —a guilt which can be arrived at, however, only by giving the Interstate Commerce Act a strained and unnatural construction; a construction, be it noted, inconsistent with the Commission's previous ideas on the subject. For, as Chairman Caskie said in his dissent (R. 25), the Commission recommended in its annual reports to Congress for 1935 and 1936, that it be given statuory authority to protect employes from undue financial loss arising from authorized railway unification but Congress, although it has amended the Interstate Commerce Act in other respects, has never changed Section 5(4) since the Commission has submitted that recommendation. Although its recommendation has been pending before Congress for 4 years, the Commission's jurisdiction has not been changed.

II

THE ORDER, SANS CONDITIONS, IS COMPLETE AND SELF-SUSTAINING AND RESTS UPON ADEQUATE FINDINGS UPON EVERY MATTER WHICH IS PROPERLY INCLUDED WITHIN "PUBLIC INTEREST". THE PUBLIC INTEREST FACTORS ARE UNAFFECTED BY THE ANNULMENT OF THE CONDITIONS. THE CONDITIONS ARE THEREFORE SEVERABLE AND THEIR ANNULMENT DOES NOT DESTROY THE INTEGRITY OF THE ORDER.

Giving the term "public interest" its proper meaning, as set forth under Point I, *supra*, it is apparent that the Commission's reports (of both Division 4 and the entire Commission) contain findings in favor of the public interest upon every aspect in which that interest is affected by the proposed lease. Division 4 found (R. 9-10):

> "Train operations are conducted irrespective of State boundary lines. The train operations limited to the State of Texas are said to be very few. No change in train operations is here involved. Operation by the Rock Island under the proposed lease will not impose upon the public any conditions pertaining to transportation of freight different from those now in effect, will result in no change in service to the public, and will have no effect upon rates or routes."

And again (R. 14),

> "It is clear from the record that the duplicate accounting now necessary under the present plan of operating the properties of the applicants requires excessive expenditures not in the public interest and which are a burden on interstate and foreign commerce."

These findings were affirmed by the entire Commission upon the reargument (R. 19).

With the quantity and quality of train service unimpaired, carrier service unchanged, rates and routes un-

affected, and economy promoted by elimination of excessive expenditures not in the public interest, it is impossible to conceive of any other matter in which the proposed lease can affect the interests of the public.

It is self-evident that none of these matters is dependent in the slightest degree on, or has any possible connection with, the subject-matter of the conditions. The frequency and speed-schedules of trains, the rates and routes, and the general transportation conditions under the lease operations will remain the same whether or not the persons whose employment is terminated are paid a dismissal wage. Non-payment will not diminish to the slightest extent the virtues of the lease. This result demonstrates that the order, resting upon grounds sufficient to support it, is complete and self-sustaining, and that the removal of the conditions does not impair it.

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 282 U. S. 311, 331.

Appellants attempt to distinguish that case. They say (Brief, p. 47) that the majority opinion (1) dealt only with the question of the lower court's jurisdiction to entertain the suit and did not discuss the question of what relief should be granted; (2) is based primarily on the view that the subject-matter of the condition had no relation to the subject-matter of the proposal for which authority was sought, and therefore the condition was regarded as a separable and collateral part of the order.

The first attempted distinction is repelled by the opinion on its face; the concluding paragraph (p. 331) reads:

> "From the foregoing it results that the condition in respect of the special fund of $1.50 per share was properly set aside and its enforcement enjoined by the court below. *Decree affirmed.*"

The decree below enjoined the condition which required

the company to impound the $1.50 per share in a separate fund. This was the relief granted. There is not the slightest hint in the opinions, either of this Court or of the lower court, that the injunction impaired the validity of the remaining part of the Commission's order. That the lower court did not intend otherwise is shown by the statement (33 F. (2); at p. 589):

> "An otherwise valid order is not affected by the addition of an invalid condition."

If such order is not affected by the addition, it follows with equal logic that it is not affected by a subtraction of the invalid condition.

The second distinction fails because the difference to which it points does not exist. For in the instant case also, the subject-matter of the conditions has no relation whatever to the subject-matter of the proposed lease. Counsel assert (Brief, p. 47), that the subject-matter of the conditions and of the lease are "intimately related," but the argument ends with the mere statement. Lack of relationship is demonstrated by the fact that every conceivable objective of the lease is attainable, and every conceivable interest (as enumerated in the Commission's Reports) of the travelling and shipping public will be promoted, whether or not the ex-employes are paid dismissal wages.

III

IF SEC. 5 (4) OF THE ACT BE CONSTRUED AS GIVING POWER TO THE COMMISSION TO IMPOSE THE CONDITIONS HERE INVOLVED, THE STATUTE WOULD BE UNCONSTITUTIONAL.

1. The Subject-Matter of the Conditions Lies Outside the Realm of Interstate Commerce. The Payment of Money to Persons Who Are No Longer Employes and Who Render No Service During the Period to Which the Payments Relate, Is Not a Regulation of Interstate Commerce Within the Meaning of the Constitution.

In *U. S.* v. *Chicago, etc., R. Co.*, 282 U. S. 311, the Court said (p. 324):

> "The powers possessed by the commission are delegated by Congress under, and are to be exercised in conformity with, the constitutional grant of authority to regulate interstate and foreign commerce. Proceeding under that grant, as applied to the present matter, neither the commission nor Congress itself may take any action which lies outside the realm of interstate commerce. *Hammer* v. *Dagenhart*, 247 U. S. 251. It follows that if the condition in question relates not to such commerce, or to the rights or duties of the carrier engaged in such commerce, but exclusively to extrinsic matters, it is imposed without authority of law."

The payment of money to ex-employes certainly has no relation to interstate commerce or to the rights or duties of the carrier engaged in such commerce; such payment is exclusively an extrinsic matter. During the period of employment, the employe may be, and in most cases is, engaged in interstate commerce. He is part of the ways and means by which such commerce is carried on by the employer. But after he has left the service, he has no more connection with interstate commerce, than has a bank clerk,

a garage mechanic, or a street sweeper. Under the prescribed conditions, the obligation to pay the dismissal allowance begins when the recipient's engagement in interstate commerce ends.

A direct authority on this point is *Railroad Retirement Board* v. *Alton R. Co., et al.*, 295 U. S. 330. This involved the validity of the Railroad Retirement Act of 1934, which required railroad carriers to pay moneys into a fund for the payment of annuities to retired railroad employes. Upon the interstate commerce aspect of the case, the court said (p. 362):

> "The Act is not, in purpose or effect, a regulation of interstate commerce within the meaning of the Constitution."

Whether the ex-employe left the service because of age retirement or because his work no longer had to be performed, is immaterial. Payment of money to the ex-employe, whether called a pension in the one case, or a dismissal wage in the other, has no reasonable relation to the business of interstate commerce; and this is equally true whether the payment be voluntary or enforced.

Appellants revive the old claim that payments to ex-employes are related to the maintenance of the welfare and morale of employes still in service (Brief, p. 35-36). Without disputing that such welfare and morale are desirable, we reply that the claim is utterly fanciful. It is the same assertion which this Court disposed of in *Railway Retirement Board* v. *Alton R. Co., et al.*, 295 U. S. 330:

> "The petitioners' explanation of this feature of the Act is • • • that such a provision is reasonable 'because it improves the morale of the employes while they are in service.' Assurance of security it truly gives, but, quite as truly, if 'morale' is intended to connote efficiency, loyalty and continuity of service, the surest way to destroy it in any privately owned

business is to substitute legislative largess for private bounty and thus transfer the drive for pensions to the halls of Congress and transmute loyalty to employer into gratitude to the legislature. (p. 351)

"In final analysis, the petitioners' sole reliance is the thesis that efficiency depends upon morale, and morale in turn upon assurance of security for the worker's old age. Thus pensions are sought to be related to efficiency of transportation, and brought within the commerce power. In supporting the Act the petitioners constantly recur to such phrases as 'old age security,' 'assurance of old age security,' 'improvement of employee morale and efficiency through providing definite assurance of old age security,' 'assurance of old age support,' 'mind at ease,' and 'fear of old age dependency.' These expressions are frequently connected with assertions that the removal of the fear of old age dependency will tend to create a better morale throughout the ranks of employes. The theory is that one who has an assurance against future dependency will do his work more cheerfully, and therefore more efficiently. The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type, is in any just sense a regulation of interstate transportation. If that question be answered in the affirmative, obviously there is no limit to the field of so-called regulation. • • • We think the answer is plain. These matters obviously lie outside the orbit of Congressional power." (pp. 367-368)

2. *The Compulsory Payment of Money to Persons Who Are No Longer Employes and Who Render No Service Deprives Appellees of Due Process of Law by Taking Their Property and Bestowing It Upon Others.*

It is elementary that the plenary power of Congress to regulate interstate commerce is not absolute, and is subject to the limitations and guaranties of the Fifth Amendment to the Constitution. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312. If Sec. 5(4) of the Act be construed as authorizing the imposition of the conditions in this case, it is unconstitutional. The ex-employes have been paid in full for services rendered prior to their dismissal. They give nothing in return for any so-called dismissal wages thereafter paid to them. Such compulsory payment finds no support in the power of Congress to regulate wages of railroad employes (*Wilson* v. *New, et al.,* 243 U. S. 332); there, the carrier still receives the employes' services in return. Nor can support be found in the principle announced in *Noble State Bank* v. *Haskell,* 219 U. S. 104, in which this Court upheld a statute which required State banks to contribute to a guaranty fund established to make good losses to the depositors of banks which might become insolvent. The benefit which each party received in this scheme of mutual protection was held to be sufficient compensation for the correlative burden which it was compelled to assume. In the present case, the burden is wholly one-sided, and the ex-employe gets all the benefit; in *Retirement Board* v. *Alton R. Co.,* 295 U. S. 230, the court held that the compulsory payment by the carriers into a fund to be disbursed to ex-employes was the taking of property or money of one and transferring it to another without compensation, and that this contravened the due process clause of the Fifth Amendment.

REPLY TO APPELLANTS' ARGUMENT

The Summary of Argument contains an inaccuracy of statement:

> "The District Court, in *ruling* that the conditions imposed by the Commission were not in the public interest," etc. (p. 13)

This language implies that the court found that the conditions were *against* public interest instead of *for* it, as the Commission believed, and therefore held them invalid. Actually, the ruling was that the conditions were invalid because they were *unrelated* to public interest.

Appellants evidently feel the compelling effect of this Court's interpretation of the term "public interest" as used in Sec. 5(4) (b), *i. e.*, that it "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities."

> *New York Central Securities Corp.* v. *United States*, 287 U. S. 12.
>
> *Texas, et al.*, v. *United States*, 292 U. S. 522.
>
> *Schechter Corp.* v. *United States*, 295 U. S. 495, 540.

Being foreclosed from finding warrant for the conditions in the term "public interest", they seek a further source of authority and purport to find it in the language which gives the Commission power to impose such conditions as it shall find to be just and reasonable. (See Brief, p. 16, *et seq.*) They raise this power to the status of a standard, equal to and coordinate with the requirement of harmony with the Commission's general consolidation plan and promotion of public interest. See "Summary of Argument," pp. 13-14, where these categories are separately designated as *first, second* and *third.*

For the reasons hereinbefore stated, pp. 18-20, the power to impose conditions is not a standard. A standard represents an end, and the Commission's function is to see that it is attained. The power to impose conditions is simply a means—by altering the proposals of the carriers in case they are deficient—to the attainment of the specified standard.

On page 18, the same idea is stated thus: the Commission, in passing upon projected acquisitions of control "is required to pass upon three distinct questions":

1. Is the proposal in harmony with its Consolidation Plan?
2. Will the proposal "promote the public interest" from the standpoint of transportation service?
3. Are the terms and conditions of the proposal just and reasonable?

We submit that in any case where the Commission answers questions 1 and 2 affirmatively, question 3 and the need for an answer do not arise. It is only when either question 1 or question 2 is answered negatively that any further inquiry need be made; and in such case the inquiry is What terms and conditions are justly and reasonably required, by way of alteration or modification, to warrant an affirmative answer?

Counsel expand their argument on this head, saying that the Commission must find that the transaction, in addition to promoting the public interest from the standpoint of transportation service "is just and reasonable to all parties involved and directly affected." (p. 18) Who are these "parties" outside of the lessor, the lessee and the public which makes use of transportation service? Counsel mention only two—minority stockholders and employes. Their argument is that if the interests of minority stockholders can be protected by the Commission, "it certainly can protect the other", the employes. (p. 21) This argu-

ment has a twofold weakness. *First*, this Court has never decided that the Commission has power under Sec. 5(4) to protect interests of minority stockholders; a proceeding under that section is of that kind where the Commission is invested with power to free an applicant of restrictions placed upon his conduct by a statutory scheme*. But since the Commission's approval is only permissive, an applicant who has been so freed from statutory restrictions may be still bound by its private contracts, including the charter contract with its stockholders. The Commission's approval does not excuse a successful applicant from performing its contracts. *Central N. E. Ry. Co.* v. *B. & A. R. Co.*, 279 U. S. 415. So if an approved lease violates the legal rights of minority stockholders, the same judicial remedies are open for their redress as existed prior to the enactment of Sec. 5(4). *Second:* The concerns of minority stockholders and of employes are too unlike in kind to permit the conclusion that power over the one necessarily implies power over the other. Except for the convenient figment of the corporate entity, the stockholders are the corporation, and it is they who in reality are the lessor or the lessee, although conveniently designated by the corporate name of their company. The employes have no corresponding status of any kind; their relationship to the railway company occupies no higher ground in this respect than that of the adjacent property owners in *West* v. *P. B. & W. R. Co.*, 141 Atl. 509, or of the persons who hire livery cars in *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252.

Appellants devote pages 24-32 to the proposition that the conditions imposed are just and reasonable. But the petition contains no allegation to the contrary, and therefore appellants' efforts are directed to a matter not in issue. The petition alleged, and the lower court held, that

* See *U. S., et al.*, v. *Maher*, 59 Sup. Ct. Rep. 768, 770; *Rochester Telephone Co.* v. *U. S., et al.*, 59 Sup. Ct. Rep. 754, 756.

the Commission lacked power over the subject-matter of the conditions. There was no need there or here to inquire whether, considered apart from the question of power, they are just and reasonable or are supported by the evidence of record. Of course, what appellants are trying to do is to establish that the conditions conform to the supposed standard of "just and reasonable to all parties affected thereby." But as we have previously shown, no such standard exists.

Much is attempted to be made of various matters, such as the provisions of the agreement of May, 1936, relative to payment of dismissal compensation in the event of consolidations, mergers, etc.; the action of the Baltimore & Ohio Railroad and of the Union Pacific Railroad in 1935 in agreeing to pay dismissal compensation; the Emergency Railroad Transportation Act of 1933, which limited action taken by the Coordinator under the Act to that which would not reduce the number of employes in service, etc.; and the pendency of certain bills before the present Congress providing that the Commission shall require, in approving a proposed consolidation merger, etc., a fair and equitable arrangement to protect the interests of the affected employes. Most of these matters are not in the record and reference to them is an imposition upon both the Court and appellees. The chief significance of the agreement of May, 1936, is not stated; it is that the agreement specifically provides that The Chicago, Rock Island and Pacific Railway Company and The Chicago, Rock Island and Gulf Railway Company are to be treated as *one carrier* (R. 13). Thus, the unification of these two properties is expressly without the obligation of the May, 1936, agreement to pay dismissal compensation. Notwithstanding, the employes (parties to that agreement by signature of their representatives) who appeared at the hearing before the Com-

mission, requested the imposition of the conditions in controversy (R. 12-13), and the Commission acted accordingly.

No one can dispute that a power of the kind which the Commission has here sought to exercise is large and important; so much so that one might reasonably expect, as Chairman Caskie said (R. 24) that had Congress intended to invest the Commission with that authority, it would have expressed that intention in definite and unequivocal language. Its important character is also attested by the repeated requests of the Commission to Congress that it be given such power; by the provision therefor in the bills now pending before Congress; by the recommendations on the subject contained in the Fourth Report to Congress of the Federal Coordinator of Transportation; and by the recommendation for legislation in that behalf by the so-called Committee of Six. No one can say that the subject has not been thoroughly aired during the past several years. But why is all this urging from divers quarters necessary, if the Commission already has the power? Appellants seek to escape the natural inference by asserting that these efforts are merely for the purpose of having possible doubt removed. That is a lame explanation; none of those proponents expressed any doubt. It is unlikely that the attainment of that minor objective would serve to stir up the interest shown and efforts made by them.

Next, appellants argue that the conditions *are* in the public interest (Brief, pp. 32-37). A basis for this assertion is the Commission's finding that the conditions prescribed "will promote the public interest" (p. 33). Since this finding gives rise to the very matter in controversy, it cannot serve as an argument in its own support.

Another basis is the "established determination of Congress that there is a direct relationship between the welfare of railroad employes and the maintenance of an ef-

ficient transportation system." As evidence of this determination, appellants refer to such statutes as Hours of Service Act, Safety Appliance Act, Railway Labor Act, etc. The answer is that these statutes, and others of analogous character, have a direct and immediate connection with the actual operation of the railroads; they all affect employes while in the service, but not ex-employes no longer in service.

Upon the question of the impairment of appellees' constitutional rights under the Fifth Amendment, appellants say that since "the conditions are clearly just and reasonable" no question of due process is involved. How the "just and reasonable" character of the conditions enables them to escape the operation of the Fifth Amendment, we are unable to see. Appellants give no reason beyond the bare affirmation. The compulsory payment of money by one person to another amounts to taking of property; due process forbids such taking without compensation, without something of value received in return. Here, the ex-employes give nothing and appellees receive nothing. Their former labor is fully paid for; the further payments confer no benefit upon the appellees from either the recipients or anyone else.

Mulford v. *Smith*, 307 U. S. 38, is no relevant authority. There, lack of due process was asserted on the ground that the statute operated retroactively and affected production of crops already planted. This Court denied the premise, holding that the law affected only marketing and that it took effect before the crops were ready for market. Nor are the *Second Employers' Liability Cases*, 223 U. S. 1, in point. The *welfare* referred to was "of those who are immediately concerned"; that is, employes in service and subject to present hazards.

Counsel try to distinguish *Railroad Retirement Board*

. Alton R. Co., 295 U. S. 330, in respect of the commerce power features of that case. But they point out no difference under the Fifth Amendment between compulsory payments to former employes, called "pensions," and compulsory payments to former employes, called "dismissal wages."

In Part II, appellants assert that the lower court erred in entering a decree "which purports to leave outstanding and valid an authorization which was not granted by the Commission," etc. (p. 40); and that the court should have remanded the whole proceeding to the Commission for the performance of the administrative function in a manner not inconsistent with the judgment of the court as to the validity of the conditions.

The relief granted was authorized by the statute and by the decision of this Court in the case of *United States v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 282 U. S. 311. The statute, U. S. Code, Title 28, Sec. 41, empowers the Court to enjoin "in whole or in part" any order of the Commission; the same provision is contained in the *Urgent Deficiencies Act*, 38 Statutes at Large, 220. Grant of authority to enjoin or annul part of an order necessarily implies authority to leave outstanding the part not enjoined or annulled.

In *United States* v. *Chicago, etc., R. Co.*, 282 U. S. 311, this Court affirmed a decree which enjoined a void condition attached to the Commission's order, leaving the order, shorn of the condition, in effect. There was no remand to the Commission.

There is not even a hint in the applicable statutes that the proper procedure is for the Court to remand the whole proceeding to the Commission for further action. Where the Court finds that a part of an order of the Commission is invalid, the granting of relief by enjoining or annulling the same depends upon the severability of

such part. If it is found to be severable, in accordance with familiar principles as applied to the facts and circumstances affecting the particular order under review, the grantee may enjoin the enforcement of the void part without thereby losing the grant. *U. S.* v. *Chicago, etc., R. Co.*, 282 U. S. 311, 328. What useful purpose would be served by remanding to the Commission a proceeding in which it has already made all of the basic findings necessary to support the valid part of the order, and the subject-matter of these findings is so unrelated to that of the void part that the elimination of the latter cannot affect the former? Upon remand, the Commission could not change its previous findings which represent logical conclusions compelled by the facts of record; nor could it refuse to enter a new order supported by those findings, even though it might be disappointed in learning that its authority did not reach to the extent previously supposed. Upon remand, the Commission would possess no greater power arbitrarily to deny the approval sought by the carrier than it would have had to deny approval in the first instance in any case supported by adequate record.

Thus, if the case were remanded, the function of the Commission would be simply to enter the order with the illegal part omitted—a purely ministerial act. Appellants say there are two objections to this proposition: (1) it is impossible to predict what conclusion the Commission would reach upon a reconsideration of the case within the limits of its authority as defined by the Court, and (2) the courts have no power to substitute their judgment for that of the Commission, etc. (p. 42.)

These objections are in reality one. There is no question of substitution of court judgment for that of the Commission; the court continues to accept the judgment which the Commission arrived at from a consideration of

the legally relevant facts. The soundness and cogency of that judgment are not affected by the existence of other facts which do not bear upon and are wholly unrelated to those first mentioned. Specifically, the fact that certain employes will lose their positions and may suffer hardship in consequence, is wholly unrelated to the fact that the quantity, quality and cost of transportation service to the public will not be adversely affected by the lease. How could the Commission, if it were to reconsider the matter a thousand times, arrive at any different conclusion, even though it were compelled, in the exercise of its lawful authority, completely to forget about the employes?

This same argument was presented (and rejected) in *United States, et al.*, v. *Chicago, etc., R. Co.*, 282 U. S. 311? Counsel there said:

> "If the court set aside a condition attached to an order, leaving the order outstanding without the condition, they are deciding a different administrative question from the one passed upon by the Commission. The result sought to be accomplished by the condition might have been deemed so essential that the Commission, if it had been advised that the condition was beyond its powers, would not have issued any order, but would have issued a different kind of order." (pp. 315-316.)

Stated baldly, this argument means that unless the Commission may exercise certain powers, which it believes it has or would like to have, it may refuse to exercise such power as it lawfully possesses, even where an applicant's case fully meets the standards prescribed by the statute.

Finally, appellants say that "the Commission, in authorizing the scheme, intended the conditions to be inseparable," and that to separate the conditions "is to disregard the intent of the Commission." Surely, this Court is not prepared to hold that the Commission can, by mere intent, prevent appellees from receiving the approval to

which they are entitled under the legally relevant evidence. The Commission has no power to intend anything in derogation of that right. Its "state of mind" upon matters which it has no authority to have in mind, is immaterial.

The decree of the court below should be affirmed.

Respectfully submitted,

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